

## **CHAPTER 1**

### **INTRODUCTION**

#### **1.1 Background Studies**

Time is an extremely important issue in construction. Together with cost and quality, it is a primary objective of project management, and a major criterion by which the success of a project is judged. The scope of this subject includes three basic time-related issues which are commencement, progress and completion (Murdoch and Hughes, 2000). This may be seen from clause 21.1 of PAM 98:

On the Date of Commencement stated in the Appendix, possession of the site shall be given to the Contractor who shall thereupon begin the Works, and regularly and diligently proceed with the same and complete the same on or before the Date for Completion stated in the Appendix subject to any extension of time in accordance with Clause 23.0 and/or sub-clause 32.1(iii).

clause 38(b) of PWD 203A which states:

Unless the Contract Documents shall otherwise provide, possession of the Site as complete as may reasonably be possible but not so as to constitute a tenancy, shall be given on or before the “Date of Possession” stated in the Letter of Acceptance of Tender to the Contractor who shall thereupon and forthwith commence the Works (but subject to sub-clause (a) hereof) and regularly and diligently proceed with and complete the Works on or before the Date of Completion as stated in the Appendix.

and clause 23.1 of JCT 98, which states:

On the Date of Possession possession of the site shall be given to the contractor who shall thereupon begin the Works, regularly and diligently proceed with the same and shall complete the same on or before the Completion Date.

Contracts of all kinds commonly specify a date for the performance of some obligation (Wallace, 1995). Where it comes to building contracts, stipulated periods are provided within which the buildings have to be delivered became an essential condition of the agreement (Guest, 1975). It is usual to name the date by which completion is required, as can be seen in Clause 39 of PWD 203A. Even where no precise date has been included in the contract itself, a court may be persuaded to imply a term for completion by a certain date, on the ground that the parties must have intended this, as seen in *Bruno Zornow (Builders) Ltd v Beechcroft Developments Ltd*<sup>1</sup>. The contractor’s obligation to complete the works by the completion date is, like all such obligations, backed up by legal sanctions. Under certain types of contract (for example contracts for the sale of perishable goods), time is expressly or impliedly “of the essence”. Consequently, the employer’s remedy for any lateness in performance or completion will be an award for damages for breach of contract (Murdoch and Hughes, 2000).

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<sup>1</sup> (1989) 51 BLR 16.

Under what circumstances can time be held to be of the essence of a contract? According to Chow (2004), in *United Scientific Holdings Ltd v Burnley Borough Council*<sup>2</sup>, the House of Lords, citing with approval a statement on the position in *Halsbury's Laws of England* (4<sup>th</sup> Ed), ruled that time should not be held to be of the essence unless the following conditions are present:

1. The parties must have expressly stipulated in the contract that conditions as to time should be strictly complied with
2. The nature of the subject-matter of the contract and the surrounding circumstances demonstrate that time should be considered to be of the essence
3. The party who has been subjected to unreasonable delay gives notice to the party in default making time of the essence

Section 56 (3) of Contract Act 1950 states the effect of acceptance of performance at time other than agreed (the completion date which is also the essence of the contract) upon, which reads:

If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of the promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of the acceptance, he gives notice to the promisor of his intention to do so.

The position in the rules contained in section 56 (3) of the Contracts Act 1950 is that: if in a contract in which time is of the essence, a party fails to perform it by the stipulated time, the innocent party has the right either to rescind the contract, or to treat it as still subsisting. If he treats it either expressly or by conduct as still

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<sup>2</sup> [1977] 2 All ER 62, HL, [1978] AC 1050 (HL),

continuing, the contract exists but time ceases to be of the essence and become at large. Consequently he cannot claim liquidated damages under the contract unless there is a provision as to the extension of time. However, this cessation can be revived and so time can be restored to be the essence by the innocent party serving a notice to the party in default giving a new date of completion. If this is done, there would be a date from which liquidated damages could be calculated (Sinnadurai, 1987).

At common law, the contractor's obligation to complete the works by the specified date is removed if the employer delays the contractor in the execution of the works. When the specified completion date no longer applies, time is said to be "at large", and the contractor's obligation is merely to complete the works within a reasonable time. A fundamental point is that the time for completion can only be extended where the contract permits, and strictly in accordance with the contract provisions (Murdoch and Hughes, 2000). It is a common belief in the construction industry that extensions of time are solely for the benefit of the contractor. At face value by giving the contractor more time to complete the works and by reducing his liability for liquidated damages they do appear to be one-sided. It is not the contractor who has most need of extension of time provisions, it is the employer. A string of well documented cases from *Holme v Guppy*<sup>3</sup> to *Rapid Building v Ealing*<sup>4</sup> confirm that the courts will not uphold liquidated damages where the employer has prevented completion on time unless there is express provision in the contract to extend time for the employer's default (Eggleston, 1992).

The ultimate dispute on a construction contract is for an employer to assert that time is of the essence and to determine without paying whilst the contractor is claiming time to be at large and determining for non-payment (Eggleston, 1992).

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<sup>3</sup> (1838) 3 M&W 387.

<sup>4</sup> (1984) 29 BLR 5.

Problem also arises in the wording employed by many of the standard forms of contract as there was a shortcoming in that some of them did not fully cater in the extension of time clause for all delays caused by the employer. General sweep-up wording in an extension of time clause (such as “or other unavoidable circumstances”) has been held by the English courts not to cover employer defaults. Similarly in Malaysia, only PAM 98 Clause 23.7(xi) allows the Architect to grant an extension of time for “any act of prevention or breach of contract by the Employer.” This is designed to be a “catch-all” provision so that time does not inadvertently become at large. Other forms like IEM, PWD 203A and CIDB do not have such similar provision (Martin, 2005). Thus, time will be at large when the employer causes delay to the contractor e.g. by ordering extra work and there is no provision for extension of time for the contractor.

## **1.2 Problem Statement**

The phrase “time at large” is much loved by contractors, the suggestion that the contractor has as much time as he wants to finish the works. This is not what it means. Time becomes at large when the obligation to complete within the specified time for completion of a contract is lost. The obligation then becomes to complete within a reasonable time. It is most certainly not “as and when the contractor sees fit”. The question then is what is a reasonable time? What is generally at stake in the matter of whether or not time is at large is the employer’s right to deduct liquidated damages for late completion. The right is lost completely if time becomes at large – the employer can still sue for general or unliquidated damages for late completion – but regard will then had to be the contractor’s entitlement to a reasonable time (Eggleston, 1992).

Time being “at large” does not mean that the Contractor has no obligation to complete the work. He has to complete in a “reasonable time”. What is reasonable will depend on all the circumstances at the time (Murdoch and Hughes, 1992). Calculating a reasonable time is not an easy matter and, as Emden’s Building Contracts, puts it:

When a reasonable time for completion becomes substituted for a time specified in the contract ....then in order to ascertain what reasonable time is, the whole circumstances must be taken into consideration and not merely those existing at the time of the making of the contract.

### **1.3 Objective of the Research**

The objective of this study is to determine the meaning of “reasonable time” when time is at large.

### **1.4 Scope of the Research**

The approach adopted in this research is case law based. There are no limitations as for the court cases referred to in this study in terms of type of projects as long as the case is related to time at large and reasonable time. The standard forms of contract that will be referred to are:

1. Pertubuhan Arkitek Malaysia (PAM) (2<sup>nd</sup> Edition, 1998)

2. Public Works Department (P.W.D) Form 203A (Rev. 10/83)
3. Construction Industry Development Board (CIDB) Standard Form of Contract for Building Works (2000 Edition)
4. International Federation of Consulting Engineers / Federation Internationale des Ingenieurs Conseils (FIDIC) Construction Contract (1999)

## **1.5 Significance of the Research**

This research should give a review to contractor and employer as to what is time at large and when does it apply. When the parties in the industry are equipped with the knowledge of time at large and its implications on both contractor and employer, this situation can be avoided as much as possible. Suggestion on what is a reasonable time to complete the works in the event of time at large is also provided for through this research.

## **1.6 Research Methodology**

This research involved literature review on time-related matters in the construction industry. Initial study will be carried out involving extensive reading and understanding of the concepts involved.

Then data and information collecting will be carried out. Primary source will be law cases found in Malayan Law Journal through the access of Lexis Nexis

available in the university's online database. Secondary sources such as articles, journals, textbooks and related websites will also be studied and referred to in the course of the whole research.

Analysis will be done on collected information and will be arranged in an orderly manner. Finally, writing up will be carried out, followed by checking and correction of writing.